

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

B5

PUBLIC COPY



FILE: [REDACTED]
LIN 05 063 50764

Office: NEBRASKA SERVICE CENTER

Date: DEC 26 2008

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a postdoctoral research associate at the National Jewish Medical and Research Center (NJMRC), Denver, Colorado. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

Section 203(b) of the Act states in pertinent part that:

(2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --

(A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of Job Offer.

(i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

The Service [now Citizenship and Immigration Services (CIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The petitioner claims "international and national stature in medical research," and asserts that he has "received wide international recognition." He describes his work:

I am currently a postdoctoral research associate working in the integrated department of Immunology at National Jewish Medical and Research Center & University of Colorado Health Science Center, a world-renowned institute in immunology, allergy and lung diseases. My current research work in Dr. Lawrence Wysocki's laboratory is focused on autoimmune diseases including systemic lupus erythematosus (SLE), rheumatoid arthritis (RA) and multiple sclerosis (MS). My present work has also important implications to design of idiopeptide-specific immunotherapies for autoimmunity and cancers of the lymphoid lineage.

...

From 2002 to present, I have established several unique animal models in the world and the mechanisms of autoimmune diseases can be more easily studied in these models. . . .

Certainly, a presumption arises that my future career will be one of service and benefit to the welfare of the country because . . . my illustrious research history indicates a pattern of achievement that has contributed significantly to the international effort to combat the debilitating effects of autoimmune diseases and cancer. My invention of establishing several animal models was a pioneering feat in the international scientific community. . . . My research results have already had practical and immediate impact on autoimmune disease research worldwide.

The petitioner submits copies of his scholarly articles that have been published or submitted for publication. The petitioner does not indicate the extent to which other researchers have cited his published work (citation being an objective gauge of the impact of such published work).

Several witness letters accompany the initial filing. Professor Lawrence J. Wysocki, who supervises the petitioner's work at NJMRC, states: "Because of his unique research background and past accomplishments, [the petitioner] is ideally suited for the position of Postdoctoral Research Associate at my laboratory. Already, he has made several important contributions to my research program. . . . In my opinion his contributions are among the best in the field." Prof. Wysocki lists the petitioner's contributions and describes them in technical detail. These contributions involve the petitioner's development of mouse models for the study of the genetic bases of autoimmune disorders. Prof. Wysocki asserts that the petitioner's "unique research experience, particularly in the biomedical area, is indispensable for cutting-edge research of molecular mechanism of autoimmune diseases and ultimately for designing novel therapies." Prof. Wysocki adds: "It will be a tremendous loss to my research projects if [the petitioner] were not able to continue his ongoing work," but he does not explain why the petitioner's continued involvement is contingent on the petitioner receiving a national interest waiver. The petitioner already works for Prof. Wysocki under an H-1B nonimmigrant visa, and that employment can continue while an application for labor certification, and a petition based upon that labor certification, is pending.

██████████, an associate professor at NJMRC, states that the petitioner "has clearly developed the credentials to become an independent and highly successful investigator. [His] research has distinguished him from others in his field." ██████████ claims that the labor certification process "would cause a long discontinuance in his research," but CIS records prove that this was not the case. In fact, an application for labor certification (more about which later in this decision) was pending on the petitioner's behalf at the time ██████████ wrote this letter. The petitioner's current H-1B nonimmigrant status is valid through July 2008.

██████████, an assistant professor at the University of California, Irvine, supervised the petitioner at that institution before the petitioner moved on to NJMRC. ██████████ describes various projects on which the petitioner worked, for instance:

During the time [the petitioner] worked in my group, he [participated in] a project to identify gene phenotype of B cell clonal expansion in the cerebrospinal fluid of patients. . . . [The petitioner's] contribution in this project is to construct and express autoantibodies from clonal expanded B cells in MS using sophisticated molecular immunologic techniques and antibody engineering techniques. With these engineering antibodies, [the petitioner] . . . identified some peptide sequences recognized by MS antibodies. . . . The research has important impact on prevention of MS and could be the basis of the antigen-specific immunotherapy approaches in the future.

The remaining two witnesses are both staff scientists at the National Institutes of Health (NIH). ██████████ of the National Cancer Institute discusses various autoimmune disorders and asserts that the petitioner's animal models are invaluable tools for the study, prevention, and treatment of such disorders. Dr.

██████████ of the National Institute of Allergy and Infectious Diseases states that the petitioner "has already made significant and unique contributions to the fields of T cell immune tolerance and the role of T cell help to autoreactive B cells in autoimmune diseases. His works significantly advanced our capabilities and comprehension of autoimmune diseases . . . and will lead [to] new therapy strategies for these diseases."

On June 13, 2005, the director issued a request for evidence, instructing the petitioner to provide documentary evidence to show that the petitioner meets the guidelines published in *Matter of New York State Dept. of Transportation*. In response, the petitioner has submitted several additional witness letters. Researchers from various institutions discuss the overall importance of research into autoimmune disorders, and assert that the petitioner, by developing new animal models, plays an important role in projects now underway in Prof. Wysocki's laboratory. ██████████ of Thomas Jefferson University states that the departure of the petitioner "would effectively kill the project" owing to delays in training a replacement scientist, thus equating denial of the waiver with the inevitable departure of the petitioner.

The petitioner submits a copy of an article from the *Guangming Daily* about the development of an anticancer drug. The petitioner states that he was involved in this project. Other articles indicate that one of the petitioner's projects was among 64 out of 265 nominated projects to receive a Chinese Medicine Science and Technology Prize in 2002.

The director denied the petition on September 28, 2005. In the denial decision, the director acknowledged the intrinsic merit and national scope of the petitioner's work, but found that "it has not been satisfactorily explained why the labor certification process is inappropriate in this case." The director observed that general grievances with shortcomings of the labor certification process do not intrinsically argue for a waiver of that process. The director found that the petitioner did not objectively distinguish his published work from that of others in his specialty.

On appeal, the petitioner asserts "many cases among our institute and acquaintances in which the applicants have much weaker achievement than mine were approved by the Service center." The petitioner does not identify these "many cases" or provide the evidence used in their adjudication. Therefore, the AAO is not in a position to compare the petitioner's record of proceeding with those of his unnamed acquaintances, nor can the AAO determine whether these other petitions were approved in error.

The petitioner contends that the director "is not aware of the importance of my achievements and my unique contributions to the present research. . . . I have been recognized as one of [the] top scientists in autoimmune disease field by my peers." Clearly, the petitioner has obtained and submitted favorable letters from a number of witnesses, many of them apparently independent rather than the petitioner's own collaborators. These letters generally made the same points: describing the toll of autoimmune diseases, listing the animal models the petitioner has developed, and asserting that the labor certification process would result in an intolerable interruption of the petitioner's work at NJMRC. Although the petitioner is a postdoctoral research center, and postdoctoral positions tend to be temporary by nature, there is no indication as to how long the petitioner would remain at NJMRC as a postdoctoral researcher in Prof. Wysocki's laboratory if immigration concerns were not at issue. This is a relevant question because the petitioner has already secured temporary

authorization to work for Prof. Wysocki as a nonimmigrant through 2008, by which time he would have served as a postdoctoral researcher in one laboratory or another for eight years.

The petitioner asserts that the importance of his work is evident from the funding it receives from the NIH. The burden is on the petitioner to show that this support is unusual rather than routine. We take administrative notice that the NIH distributes 80% of its nearly \$28 billion budget in research grant funding "to all 50 states, its territories, and several foreign countries." In Colorado alone, the NIH funded 1,022 grants during fiscal year 2005, including 78 grants just at NJMRC.¹ Given this information, it is not intuitively obvious that receipt of NIH grant funding is proof of a project's importance or special significance.

As noted elsewhere in this decision, an application for labor certification was filed on the beneficiary's behalf in April 2003, and this application was already pending when several witnesses wrote that the labor certification process would ill serve the national interest. The labor certification was approved, and we note the January 2006 filing of an immigrant visa petition, receipt number LIN 06 068 51360, on the beneficiary's behalf. CIS approved the 2006 petition on April 20, 2006. The beneficiary applied for adjustment of status soon after; that application is currently pending.

Because the priority date of the newer petition is based on the date of filing of the labor certification, rather than the petition, we also note that the approved petition has a priority date of April 2003, twenty months earlier than the December 2004 priority date that would attach to the present petition if it were approved. Approval of the waiver would in no way accelerate or expedite the petitioner's adjustment application, or ensure the approval thereof. We acknowledge that the petitioner apparently filed this appeal before the labor certification was approved, but it remains that, at this point, we are essentially asked to find that it is in the national interest to waive a requirement that has already been met, in order to qualify the petitioner for a significantly later priority date.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. This denial is without prejudice to any action arising from the approval of the petition with receipt number LIN 06 068 53160.

ORDER: The appeal is dismissed.

¹ Sources: <http://www.nih.gov/about/> and <http://silk.nih.gov/public/cbz2zoz.@www.fy2005.colorado.csv>, both visited November 27, 2006.